

PARLIAMENTARY COUNSEL

Office Procedural Circular No. 69 Procedures for determining breaches of the Code of Conduct

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Part 1—Introduction

Background

1 Some of the most significant consequences of being an APS employee come from the duty to comply with the APS Values, APS Employment Principles and the Code of Conduct, which are set out in sections 10, 10A and 13 of the *Public Service Act 1999 (PSA)*. The APS Values, APS Employment Principles and the Code of Conduct bind all OPC staff.

2 The five APS Values are as follows:

- (a) ***Committed to service***—The APS is professional, objective, innovative and efficient, and works collaboratively to achieve the best results for the Australian community and the Government.
- (b) ***Ethical***—The APS demonstrates leadership, is trustworthy, and acts with integrity, in all that it does.
- (c) ***Respectful***—The APS respects all people, including their rights and their heritage.
- (d) ***Accountable***—The APS is open and accountable to the Australian community under the law and within the framework of Ministerial responsibility.
- (e) ***Impartial***—The APS is apolitical and provides the Government with advice that is frank, honest, timely and based on the best available evidence.

3 The APS Employment Principles in subsection 10A(1) of the PSA provide that the APS is a career-based public service that:

- (a) makes fair employment decisions with a fair system of review; and
- (b) recognises that the usual basis for engagement is as an ongoing APS employee; and
- (c) makes decisions relating to engagement and promotion that are based on merit; and
- (d) requires effective performance from each employee; and
- (e) provides flexible, safe and rewarding workplaces where communication, consultation, cooperation and input from employees on matters that affect their workplaces are valued; and
- (f) provides workplaces that are free from discrimination, patronage and favouritism; and
- (g) recognises the diversity of the Australian community and fosters diversity in the workplace.

4 The APS Code of Conduct is as follows:

- (a) An APS employee must behave honestly and with integrity in connection with APS employment.
- (b) An APS employee must act with care and diligence in connection with APS employment.
- (c) An APS employee, when acting in connection with APS employment, must treat everyone with respect and courtesy, and without harassment.
- (d) An APS employee, when acting in connection with APS employment, must comply with all applicable Australian laws. For this purpose, Australian law means any Act, or any instrument made under an Act or any law of a State or Territory, including any instrument made under such a law.
- (e) An APS employee must comply with any lawful and reasonable direction given by someone in the employee's Agency who has authority to give the direction.
- (f) An APS employee must maintain appropriate confidentiality about dealings that the employee has with any Minister or Minister's member of staff.
- (g) An APS employee must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment.
- (h) An APS employee must use Commonwealth resources in a proper manner.
- (i) An APS employee must not provide false or misleading information in response to a request for information that is made for official purposes in connection with the employee's APS employment.
- (j) An APS employee must not make improper use of inside information or the employee's duties, status, power or authority in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person.
- (k) An APS employee must at all times behave in a way that upholds the APS Values and APS Employment Principles and the integrity and good reputation of the employee's Agency and the APS.
- (l) An APS employee on duty overseas must at all times behave in a way that upholds the good reputation of Australia.
- (m) An APS employee must comply with any other conduct requirement that is prescribed by the regulations.

5 It should be noted that regulation 2.1 of the *Public Service Regulations 1999* (the **Regulations**) provides that an APS employee must not, except in the course of his or her duties as an APS employee or with the Agency Head's express authority, give or disclose, directly or indirectly, to any person any information about government business or anything of which the employee has official knowledge.

Part 2—Procedures for determining breaches of the Code of Conduct

Background

6 Subsection 15(3) of the PSA requires an Agency Head to establish procedures for determining whether an employee, or a former APS employee, in the Agency has breached the Code of Conduct (including by engaging in conduct referred to in subsection 15(2A)).

7 The principles underlying procedures for managing breaches of the Code of Conduct are:

- employees must uphold the APS Values and APS Employment Principles and comply with the Code of Conduct;
- taking action in cases of suspected misconduct is primarily aimed at protecting the integrity of the APS and thereby maintaining public confidence in public administration;
- misconduct action is part of a range of people management practices which OPC has in place to encourage high quality performance; and
- procedures should be fair and reasonable, striking an appropriate balance between the needs of staff, the needs of OPC and the public interest.

8 Although the range of sanctions (see paragraph 33), including termination of employment, form an integral part of any misconduct process, imposing sanctions is not primarily about ‘punishing’ an employee who has failed to meet the required standards of conduct.

9 Sanctions are intended to be proportionate to the nature of the breach and in some cases will signify that OPC no longer has confidence that the employee has the appropriate qualities to perform certain duties. Sanctions also operate as a deterrent to others and confirm that misconduct is not tolerated in OPC.

10 Under section 28 of the PSA and regulation 3.10 of the Regulations, FPC may suspend an OPC employee who is suspected of having breached the Code of Conduct.

11 Not all breaches of the Code of Conduct will necessarily be the subject of formal action. Depending on the seriousness of the conduct, the employee’s employment history and an assessment of whether the incident is likely to be an isolated one, counselling or a warning may be considered more appropriate. Other actions, such as specific training, or varying the employee’s duties or line of reporting, may also be considered.

12 It is also important to emphasise that an employee suspected of having breached the Code of Conduct is presumed not to have committed the breach until a determination has been made, using OPC’s procedures established under section 15(3) of the PSA. The determination may, of course, be that the employee did not breach the Code of Conduct and no further action is taken. It is also important to note that a sanction cannot be imposed on an employee until there is a determination that the Code of Conduct has been breached.

13 Recent amendments to the PSA allow for:

- (a) misconduct action to be taken where an employee has, before engagement, provided false or misleading information, failed to provide relevant information or otherwise failed to act with honesty and integrity in connection with their engagement as an APS employee (i.e. pre-commencement misconduct) (see subsection 15(2A) of the PSA); and
- (b) a determination of a breach of the Code of Conduct to be made after an employee separates from the APS (i.e. in relation to former APS employees) (see subsection 15(3) of the PSA and Commissioner's Directions 6.2).

14 Subsection 16(2) of the PSA requires an Agency Head to establish procedures for an APS employee to make a whistleblower report of a suspected breach of the Code of Conduct to the Agency Head or to another authorised person (a 2PC or the PLC), and for the Agency Head (or authorised person) to deal with whistleblower reports.

15 Part 3 (Whistleblowing) of this Office Procedural Circular sets out these procedures. It also provides for the protection of employees who report such breaches from victimisation or discrimination (subsection 16(1) of the PSA prohibits discrimination against, or victimisation of, an APS employee on the basis of having made a whistleblower report).

Application of procedures

16 These procedures must be complied with in determining, for the purposes of subsection 15(3) of the PSA, whether an employee of OPC has breached the Code of Conduct.

Note: These procedures apply only in relation to a suspected breach of the Code of Conduct by an employee in respect of which a determination may be made. Not all suspected breaches of the Code of Conduct may need to be dealt with by way of a determination. In particular circumstances, another way of dealing with a suspected breach of the Code of Conduct may be more appropriate.

Selection of decision-maker

17 FPC must choose a 2PC, or another person, to determine whether an OPC employee has breached the Code of Conduct and to determine any sanction to be imposed. This person is referred to as *the decision-maker*.

Decision-maker to be independent and unbiased

18 FPC will take reasonable steps to ensure that the decision-maker is, and appears to be, independent and unbiased (see Commissioner's Directions 6.5).

19 In particular, a person must not determine whether the employee has breached the Code of Conduct if the person has previously made a report in relation to any of the matters suspected of constituting a breach, by the employee, of the Code of Conduct.

Formality of procedures

20 The process for determining whether an OPC employee has breached the Code of Conduct must be carried out with as little formality and as much expedition as a proper consideration of the matter allows (see Commissioner's Directions 6.6).

Formal hearing not required

21 In particular, a formal hearing is not required for the purpose of determining whether an OPC employee has breached the Code of Conduct.

Employee must be informed that a determination is being considered (see Commissioner's Directions 6.3)

22 A determination is not to be made in relation to a suspected breach of the Code of Conduct by an OPC employee, unless reasonable steps have been taken to give written notice to the employee of:

- (a) the details of the suspected breach of the Code of Conduct (including any subsequent variation of those details); and
- (b) the sanctions that may be imposed on the employee under subsection 15(1) of the PSA—see paragraph 33; and
- (c) the name of, and details for contacting, the person who is to determine whether the employee has breached the Code of Conduct; and
- (d) the employee's rights under paragraphs 23 and 24; and
- (e) the date by which the employee may give a statement or notice under paragraph 23.

The date specified under subparagraph (e) must be at least 7 days after the day on which the notice is given to the employee.

Opportunity for employee to make statement before determination is made (see Commissioner's Directions 6.3)

23 An employee who is given notice under paragraph 22 is entitled to give the decision-maker:

- (a) a written statement in relation to the suspected breach; or
- (b) a written notice that the employee wishes to make an oral statement in relation to the suspected breach.

The statement or notice must be given before the date specified in the notice under subparagraph 22(e) (or such later date as the decision-maker allows).

24 If the employee gives a statement or notice under paragraph 23, the employee must also be given the opportunity to make an oral statement in relation to the suspected breach to the decision-maker. If the employee makes an oral statement in relation to the suspected breach, the decision-maker may require that the oral statement be recorded and/or reduced to writing.

25 If the employee does not make a written or oral statement in relation to the suspected breach, the employee is not, for that reason only, to be taken to have admitted committing the suspected breach.

Employee support

26 An employee may have the support of another person in preparing and providing a written or oral statement for an alleged breach of the Code of Conduct.

27 Such a person may be present when an oral statement is being provided by the employee to the decision-maker. That person's role is to provide support and advice to the employee, and ensure that the employee is able to raise all matters of relevant concern to the process. Their role is not to act as the employee's advocate. If the person is disruptive while the employee is making an oral statement, the decision-maker may require the person to leave.

Standard of proof

28 Consistent with the requirements of administrative law, the standard of proof for determining whether a breach of the Code of Conduct has occurred is *on the balance of probabilities*. This means that the decision-maker must be satisfied that a breach of the Code is more probable than not. This differs from the criminal law standard of proof which is *beyond reasonable doubt*.

Past conduct

29 The decision-maker should ordinarily consider only the incident(s) in question to make that determination. In some cases, however, evidence of prior 'similar facts', or evidence which shows a particular tendency, may be relevant to a determination about the incident(s) in question. The employee should be advised of any past conduct that it is proposed to take into account in this regard.

30 When deciding on an appropriate sanction, a decision-maker may consider past behaviour, and in particular whether previous warnings, counselling or sanctions have relevance. For example, if repeated counselling has not changed the employee's conduct, a more serious sanction may be appropriate. The employee should be advised of any past conduct (both satisfactory and unsatisfactory) that it is proposed to take into account when deciding a sanction. In any event, the rules of procedural fairness would require that, in imposing a sanction, a statement of reasons should be provided to the employee.

Action that may be taken if breach found to have occurred

31 If a determination is made that an OPC employee has breached the Code of Conduct:

- (a) the employee may be counselled; or
- (b) a sanction may be imposed on the employee under section 15 of the PSA.

Note: A sanction cannot be imposed on a former APS employee.

Employee must be informed before a sanction is imposed (see Commissioner's Directions 6.4)

32 A sanction is not to be imposed on the employee unless reasonable steps have been taken to give a written statement to the employee setting out:

- (a) the determination; and
- (b) the sanction or sanctions that are under consideration; and
- (c) the factors that are under consideration in determining any sanction to be imposed; and
- (d) the name of, and details for contacting, the person who is considering any sanctions to be imposed; and
- (e) the date by which the employee may give a written statement or notice (if the employee wishes to make an oral statement) in relation to the sanctions under consideration.

The date specified under subparagraph (e) must be at least 7 days after the day on which the statement is given to the employee.

Sanctions

33 If, under those procedures, an employee is found to have breached the Code of Conduct, a sanction may be imposed on that employee under subsection 15(1) of the PSA (see regulation 2.3 of the Regulations for limitation on sanctions). The sanctions are as follows:

- (a) a reprimand;
- (b) deductions from salary, by way of fine;
- (c) reduction in salary;
- (d) re-assignment of duties;
- (e) reduction in classification;
- (f) termination of employment.

34 The procedures set out in this Circular must be followed before a determination can be made that provides a basis for imposing one of those sanctions. However, a suspected or alleged breach of the Code of Conduct need not be handled under those procedures if there is a more appropriate way of handling it. In other words:

- (a) a suspicion or allegation that an employee has breached the Code of Conduct will not automatically lead to action under these procedures; but
- (b) if there is no action under these procedures, there can be no sanction under section 15 of the PSA.

Record of determination and sanctions (see Commissioner's Directions 6.7)

35 If a determination in relation to a suspected breach of the Code of Conduct by an employee of OPC is made, a written record must be prepared and given to FPC of:

- (a) the suspected breach; and
- (b) the determination; and
- (c) any sanctions imposed as a result of the determination; and
- (d) if a statement of reasons was given to the employee—the statement of reasons.

Note: The *Archives Act 1983* and the *Privacy Act 1988* apply to a record made under this paragraph.

36 Where the written record is to form the basis of a statement specifying the grounds for termination of employment (as required by subsection 29(2) of the PSA), the statement must also have regard to the requirements of section 25D of the *Acts Interpretation Act 1901*. That is, as well as specifying the grounds, it must also set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based.

What happens when an ongoing employee is to move to another Agency during an investigation?

37 Paragraph 38 applies if:

- (a) an ongoing OPC employee is suspected of having breached the Code of Conduct; and
- (b) the employee has been informed of the matters mentioned in paragraph 22; and
- (c) the matter has not yet been resolved; and
- (d) a decision has been made that, apart from the Code of Conduct investigation, would result in the movement of the employee under section 26 of the PSA to another Agency (including on promotion).

38 Unless FPC and the Agency Head of the other Agency agree otherwise, the movement (including on promotion) of the OPC employee does not take effect until the matter is resolved. The matter is taken to be resolved when a determination is made or it is decided that a determination is not necessary.

39 If the employee has moved to another Agency, a determination (if any) in relation to the suspected breach must be made in accordance with the procedures applicable in that Agency at the time when the process for determining whether the employee has breached the Code of Conduct commenced.

40 If:

- (a) an employee of another Agency is suspected of having breached the Code of Conduct; and

- (b) the employee moves to OPC before any determination is made in relation to the suspected breach;

a determination (if any) in relation to the suspected breach must be made in accordance with the procedures applicable in OPC at the time when the process for determining whether the employee has breached the Code of Conduct commenced.

Review of actions

41 A non-SES employee who has been found to have breached the Code of Conduct and who wishes to challenge either the determination that a breach has occurred or the sanction imposed (except in the case of termination of employment), may lodge an application for a review of actions under Division 5.3 of the Regulations. A decision to suspend an employee can also be the subject of review.

42 A decision to temporarily re-assign the employee's duties would be subject to review only where the reassignment involved any of the circumstances provided for in Schedule 1 of the Regulations.

43 An application for review of a determination that an employee has breached the Code of Conduct, or of a sanction imposed for a breach of the Code, must be made to the Merit Protection Commissioner (subregulation 5.24(2)). Applications for the review of decisions relating to suspension will generally be made in the first instance to FPC (subregulation 5.24(1)). The making of an application for review does not operate to stay the action (regulation 5.36).

44 An application for a review of action relating to a determination that the Code of Conduct has been breached or consequent sanction imposed must be made to the Merit Protection Commissioner within 60 days of the determination being made or the sanction being imposed (items 2 and 3 of subregulation 5.23(4)).

45 An employee who has been dismissed may have the right under the unfair dismissal provisions of the *Fair Work Act 2009* to apply to the Fair Work Commission for a remedy.

Criminal matters

46 Criminal proceedings may result from an employee's behaviour in the workplace as well as through his or her private actions.

47 If an employee is being dealt with in connection with both criminal action in the workplace and a suspected breach of the Code of Conduct, procedural fairness would require that the two matters are dealt with by different people. While it is possible to pursue the misconduct process at the same time as the criminal process, care must be taken not to risk jeopardising the prosecution of the criminal charge. Close liaison with the external investigating authority and the prosecuting authority is recommended.

48 If it comes to light that an employee, *through his or her private actions*, has been charged with a criminal offence, and where the criminal charge relates to behaviour that could have an impact on the person's ability to maintain honesty and integrity in their APS employment, or if the employee's behaviour is otherwise inconsistent with the APS Values, APS Employment Principles or is likely to damage the integrity or good reputation of the

APS, it may be appropriate to take action to investigate the matter as a possible breach of the Code of Conduct. In serious cases, it may be appropriate to suspend the person until the decision of the Court is known. FPC should take action to suspend an employee only where FPC believes on reasonable grounds that the employee has, or may have, breached the Code of Conduct, and that the employee's suspension is in the public or OPC's interest (regulation 3.10).

49 If a criminal charge has been heard, FPC may commence a misconduct process on the basis of its effect on the employee's employment.

50 Certain criminal charges may have different impacts in different agencies. For example, an employee of a law enforcement agency may be treated more severely for actions involving non-compliance with legal requirements, such as tax avoidance. A person charged with child abuse offences may face very severe sanctions if their work involves working with children.

Further information

51 Further information can be found in the APSC publication 'Handling Misconduct: A human resources practitioner's guide to the reporting and handling of suspected and determined breaches of the APS Code of Conduct' at <http://www.apsc.gov.au/aps-employment-policy-and-advice/aps-values-and-code-of-conduct/handling-misconduct>.

Part 3—Whistleblowing

Reporting of breaches (or alleged breaches) of the Code of Conduct

52 An OPC employee should report to FPC, a 2PC or the PLC any breach or alleged breach of the Code of Conduct which the employee believes should be appropriately dealt with under the whistleblowing procedures.

Protection for reporting employee

53 Where FPC, a 2PC or the PLC receives a whistleblower report, he or she is required to accept the report and inform the OPC employee about the protections available under subsection 16(1) of the PSA. This may be done orally or in writing.

54 FPC, the 2PCs and the PLC are committed to ensuring that protection is provided against victimisation or discrimination for any OPC employee reporting a breach or alleged breach of the Code of Conduct.

Inquiry into whistleblower reports

55 Where FPC, a 2PC or the PLC receives a whistleblower report, he or she will complete an inquiry and make a decision on the report, unless FPC reasonably believes that there are circumstances in which to decline the report or discontinue the inquiry into the report (see subregulation 2.7(2) of the Regulations for circumstances in which an Agency Head can decline to conduct or discontinue an inquiry). In a case where the report has been made to the 2PCs or the PLC, the 2PC or PLC will consult with FPC before commencing the inquiry and before making a decision.

56 The purpose of the inquiry into the whistleblower report is not to decide whether there has been a breach of the Code of Conduct, but rather to establish whether there is sufficient substance to the report to warrant starting an investigation of the alleged breach of the Code of Conduct under Part 2 of this Office Procedural Circular.

57 The outcome of the inquiry into the whistleblower's report will be dealt with as soon as practicable.

58 For a breach or an alleged breach by persons other than OPC employees, FPC will take action that is appropriate in the circumstances.

Opportunity for the employee to be heard

59 Under procedural fairness, any person whose interests are likely to be adversely affected by a decision on the whistleblower's report will generally be given the opportunity to make a statement (orally and/or in writing) about their views of the matter, before any findings or any recommendations are made on the report.

Advice to reporting employee

60 FPC will advise the employee who made the report of the outcome of any inquiry into the report, including whether it is proposed to decline or discontinue inquiry into the report. Advice to the employee will include, at the discretion of FPC, general or specific advice as to the nature of any further action that is intended.

61 The employee who made the report will be advised also that, if he or she is not satisfied with the outcome of the inquiry into the report or other action taken, he or she may report the matter to the Public Service Commissioner or the Merit Protection Commissioner.

Reports to the Australian Public Service Commissioner or the Merit Protection Commissioner

62 In accordance with Division 2.2 of Part 2 of the Regulations, a whistleblower's report may be made to a Commissioner in two circumstances:

- (a) where the Commissioner agrees that a report relates to an issue that would be inappropriate to report to the employee's Agency Head; or
- (b) where an employee has made a report within their agency and is not satisfied with the outcome of the inquiry into their report at the agency level.

63 If a matter is reported to a Commissioner, the Commissioner will handle the matter in accordance with the basic procedural requirements set out in regulations 2.4 and 2.5 of the Regulations.

Possible relevance of other procedures

64 Nothing in these provisions prevents an employee taking action under the grievance procedures referred to in OPC No. 41—Resolution of disputes and grievances, or making use of the counselling and related services referred to in OPC No. 49—Employee assistance program. Employees should satisfy themselves that those processes are unlikely to be

adequate to resolve the issue of concern to them before deciding to seek recourse to the whistleblowing procedures set out in this Part.

Peter Quiggin PSM
First Parliamentary Counsel
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